

The Water Code and Litigation Over Water Rights

It is frequently argued that the Hawaii State Legislature should wait before enacting a Water Code until the litigation over private rights in water is concluded. In fact, however, there is no need for the Legislature to wait, and its action now would reduce conflicts and litigation in the future. A brief summary of Hawaii's protracted water rights litigation can help explain why legislative action is appropriate and necessary now.

The principal case of McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 505 P.2d 1330 (1973), involved a battle between two private landowners on Kauai over how the surface water crossing their lands should be divided between them. When the case reached the Hawaii Supreme Court, the Court said that neither private owner had title to the surplus water, because water is part of the public trust and is not susceptible to private ownership in the usual fashion. The Court recognized that landowners had rights to use water as appropriate for their agricultural needs, but questioned whether they could buy and sell it like an ordinary market commodity or transport it freely from one part of the island to another. In rendering its decision, the Court drew upon native Hawaiian practices and laws as well as more recent statutes and decisions. Its decision reached a conclusion that is a reasonable attempt to determine the governing law on a subject that was previously contested and confusing. The Court also recognized, however, that still greater clarity would be useful and urged the Legislature to act:

It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii, and we are bound to follow it. We invite the legislature to conduct a thorough re-examination of the area. (McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 189 n. 15, 505 P.2d 1330, 1340 n. 15 (1973) (emphasis added).)

After the Hawaii Supreme Court reaffirmed its original judgment and the U.S. Supreme Court denied review (417 U.S. 862), the U.S. District Court for the District of Hawaii (Judge Pence) issued an injunction stating that the State of Hawaii could not enforce the McBryde decision because it constituted a change in the law of Hawaii and deprived the private landowners of vested property rights. Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977)

After the State of Hawaii appealed this decision to the U.S. Court of Appeals for the Ninth Circuit, that court asked the Hawaii Supreme Court to clarify its 1973 decision by posing six specific questions to the Court. The Hawaii Supreme Court answered these questions in detail emphasizing that its 1973 language was designed only to recognize the State's obligation to manage water as part of its public trust obligations and that the State did not own the water in the sense of being able to do with it as it pleases. The Court also said that its 1973 decision had not stated that no water could ever be diverted from one watershed to another, but rather had identified issues that should be addressed in determining whether such diversions are appropriate. Robinson v. Ariyoshi, 65 Hawaii 641, 658 P.2d 287 (1982).

Despite these clarifications, the U.S. Court of Appeals for the Ninth Circuit affirmed Judge Pence's decision that the landowners had vested property rights in the surplus water and that the Hawaii Supreme Court's decision could not be enforced to divest those vested rights. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985).

In the late spring of 1986, the U.S. Supreme Court vacated this Ninth Circuit decision and directed Judge Pence to reconsider his decision in light of Williamson County Regional Planning Commn. v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985). That decision had stated that federal courts should not become involved in property disputes until all possible legal avenues have been pursued through state agencies and courts and until it is crystal clear exactly what the property owner has lost. The U.S. Supreme Court thus indicated that the District Judge and the Ninth Circuit had acted prematurely in addressing the water rights litigation because it is not yet clear whether the private landowners have lost any property interests as a result of the McBryde decision and because it would be very difficult to place a value on that loss now even if one has occurred. Ariyoshi v. Robinson, 106 S. Ct. 3269 (1986).

In fact, of course, the private landowners have the same access to water they had in 1973 and the state has taken no steps to interfere with any private uses of water. The private landowners have nonetheless gone back to the U.S. District Court, arguing once again before Judge Pence that they have suffered a deprivation of property and that he should somehow reaffirm his original decision.

This sequence of events should make clear the need for legislative action now. The 1978 Constitutional Convention and the voters of Hawaii required the Legislature to establish a water resources agency:

WATER RESOURCES

ARTICLE XI, SECTION 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

Twenty years of litigation on only one case demonstrate the enormous time and costs required to resolve water disputes by judicial review of the traditional common law concepts. Litigation is not the most effective approach to this problem, and legislation is clearly needed. The court can only declare the existing law in disputes brought before it; it may not create new management plans nor establish administrative dispute mechanisms. A Water Code would (1) create a comprehensive rational plan to manage water before problems arise; and (2) establish an administrative framework to resolve disputes clearly and quickly. Because the Water Code is likely to ensure that all existing water users are able to continue to use the water they need, the Code could end the interminable litigation over water, as well as laying down a stable framework for future decisions regarding developments.

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